

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

In re:)
Docket to Determine the Compliance)
of BellSouth Telecommunications, Inc.'s)
Operations Support Systems with State)
and Federal Regulations)

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OFFICE OF THE
EXECUTIVE SECRETARY
Docket No.: 01-00362

**OPPOSITION TO BELL SOUTH'S PROPOSED REVISIONS TO PHASE II ISSUES LIST
OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.,
TCG MIDSOUTH, INC., MCI WORLDCOM, INC.
AND SOUTHEASTERN COMPETITIVE CARRIERS ASSOCIATION**

As requested by the Prehearing Officer at the Prehearing Conference on January 8, 2002, AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc. (collectively "AT&T"), the Southeastern Competitive Carriers Association ("SECCA"), and MCI Worldcom, Inc. hereby submit to the Tennessee Regulatory Authority ("TRA" or "Authority") their opposition to the proposed revisions to the Phase II Issues List submitted by BellSouth Telecommunications, Inc. ("BellSouth").

In our Proposed Revisions to Phase II Issues List dated January 10, 2002, we explained that the Authority should not make any substantive changes to the Phase II Issues List unless serious and compelling reasons dictate otherwise. We also explained that no serious or compelling reasons exist that would warrant a substantive change, and proposed several minor clarifications.

In its filing, BellSouth does not point to any serious or compelling reasons to make substantive revisions to the Phase II Issues List.¹ Rather, BellSouth claims on page two of its filing that the "purpose of BellSouth's revisions is to clarify the issues to be presented to the Authority and to give the Authority an opportunity to further define the scope of the proceeding." However, as explained below, BellSouth's proposed revisions go far beyond clarifying the existing issues. Indeed, BellSouth's proposed revisions is the latest in a series of attempts to hijack this proceeding to satisfy its own corporate needs at the expense of the Authority's ability to meet its statutory obligations to Tennessee consumers. Accordingly, the Authority should reject BellSouth's proposed revisions to the Phase II issues list.

BellSouth also raises several miscellaneous issues in its filing regarding Phase II witnesses and the procedural schedule. We address each of these issues as well.

I. THE AUTHORITY SHOULD REJECT BELL SOUTH'S PROPOSED REVISIONS TO THE PHASE II ISSUES LIST.

A. BellSouth's Proposed Revisions Are Aimed at Promoting Its Corporate Agenda Rather than Satisfying the Stated Purpose of this Docket.

The stated purpose of this docket is "to determine whether existing data or test results derived from OSS testing in other states is reliable and applicable to Tennessee and, in those instances where reliance on such testing is inappropriate, to conduct such testing." September 13th Order at 1. Ultimately, this docket should provide the Authority with the means by which it

¹ BellSouth states at page six of its filing that its proposed revisions more accurately reflect the scope of Phase II "[i]n light of FCC jurisprudence, and the developments during Phase I of the hearing." FCC jurisprudence, however, has not changed since the Authority's September 13th Order. BellSouth, moreover, does not explain what "developments during Phase I of the hearing" would warrant a change in the Phase II issues.

can collect the information it needs to conduct an exhaustive and rigorous review of whether CLECs "operating in Tennessee have nondiscriminatory access to BellSouth's Operations Support Systems (OSS) as required by BellSouth's compliance with state and federal law." *Id.* It may or may not be necessary to conduct additional testing to obtain the information the Authority would need. Any such testing may or may not resemble the various third party tests conducted in other states such as Florida or New York, and may take creative new approaches. Phase II will help the Authority make these decisions.

BellSouth's proposed revisions are not aimed at facilitating the Authority's ability to conduct an exhaustive and rigorous review of BellSouth's OSS. Instead, BellSouth seeks to promote its own corporate agenda by crafting issues that are designed to restrict the Authority's inquiry to the minimal amount of evidence necessary for BellSouth to make its *prima facie* 271 case before the FCC. Throughout its filing, BellSouth repeatedly tries to focus Phase II on the evidence that BellSouth chooses to present for its section 271 case. Phase II of this docket, however, is not supposed to be a dress rehearsal for BellSouth's 271 application to the FCC. While BellSouth ultimately has the burden of proof to establish compliance with section 271 in its FCC application, the Authority's focus at this stage of this docket is to identify and gather the information it needs to conduct a balanced and thorough analysis of whether BellSouth is providing the OSS necessary to support robust competition in Tennessee. BellSouth's proposed issues do not facilitate that endeavor.

Tennessee law charges the Authority with certain responsibilities. Indeed, this docket relates to assessing compliance with state and federal law. How the Authority decides to investigate BellSouth's compliance with state law is not constrained in anyway by the "Section 271 jurisprudence" cited by BellSouth. The Authority, therefore, should not structure this

hearing to replicate the FCC's evaluation of BellSouth's section 271 application as BellSouth suggests.

Even under federal law, the Authority should not be attempting to replicate an FCC evaluation. "Given the 90-day statutory deadline to reach a decision on a section 271 application, the Commission does not have the time or the resources to resolve the enormous number of factual disputes that inevitably arise from the technical details and data involved in such a complex endeavor." FCC NY Order ¶ 51. Accordingly, the FCC "will look to the state to resolve factual disputes wherever possible. Indeed, we view the state's and the Department of Justice's role to be one similar to that of an 'expert witness.'" FCC NY Order ¶ 51. The FCC, moreover, has explained that "where the state has conducted an exhaustive and rigorous investigation into the BOC's compliance with the checklist, we may give evidence submitted by the state substantial weight in making our decision." FCC NY Order ¶ 51. In other words, the Authority's role under federal law is to investigate compliance and resolve factual disputes much like an independent expert witness.

BellSouth's proposed issues do not facilitate the Authority's ability to conduct an independent, exhaustive, and rigorous investigation. Under the existing Phase II issues, the Authority proactively determines what information it needs to conduct its investigation. That information may not necessarily be the information upon which BellSouth would like the Authority to rely. Under BellSouth's proposed issues, the Authority is passive. The Authority would receive the information that BellSouth chooses to provide and determine whether such information would be sufficient to support BellSouth's *prima facie* case under section 271.

Every indication from the Authority in this docket suggests that the Authority wants to conduct a balanced, thorough, and well-informed investigation and review of BellSouth's OSS. We support such an investigation and review. The question in Phase II is how should the Authority obtain the necessary information. The existing Phase II issues, with or without the revisions proposed by the CLECs, will promote the Authority's ability to investigate and review BellSouth's OSS. BellSouth's proposed issues will not. Accordingly, we request that the Authority rejected BellSouth's proposed issues.

B. BellSouth's Proposed Revisions Effectively Limits the Authority's Investigation of BellSouth's Operational Support Systems.

BellSouth claims at page two of its filing that it "has revised the previously approved issues . . . to track explicitly the FCC's hierarchy of proof." We disagree. The FCC has "provided guidance on which types of evidence [the FCC] find[s] more persuasive." FCC NY Order ¶ 53. The FCC, however, has not established the restrictive "hierarchy of proof" created by BellSouth's proposed revisions. Rather, the FCC is open to any kind of probative evidence and "consider[s] the totality of the circumstances, including the origin and quality of the information before us, to determine whether the nondiscrimination requirements of the Act are met." FCC NY Order ¶ 46, 53.

BellSouth's proposed Phase II issues embody the position that the Authority should restrict its inquiry to only one type of evidence, and the particular type of evidence is driven by BellSouth's so-called "hierarchy of proof." According to BellSouth, if performance data based on sufficient commercial volumes exist, the Authority's inquiry should be limited to performance

data.² If such performance data does not exist but carrier-to-carrier testing does exist, then, according to BellSouth, the Authority's inquiry should be limited to carrier-to-carrier testing. That kind of limited, one-dimensional inquiry would continue down through the two remaining types of evidence in BellSouth's "hierarchy of proof" (i.e., independent third part testing and internal testing). Thus, under BellSouth's proposed "hierarchy of proof," the Authority would restrict its inquiry to one type of evidence and would not consider other types of evidence that could confirm or contradict the accuracy and reliability of the particular evidence at hand.

BellSouth's "hierarchy of proof" approach is inappropriate for a number of reasons, not all of which need to be discussed here. First, contrary to BellSouth's claim, its "hierarchy of proof" approach has no basis in FCC jurisprudence. The FCC considers all relevant and probative evidence, and does not restrict itself to any "hierarchy of proof." Indeed, the FCC approved section 271 applications in New York, Texas, and Massachusetts based on corroborating performance data and independent third party testing. Second, the FCC gives substantial weight to evidence submitted by the state only "where the state has conducted an exhaustive and rigorous investigation into the BOC's compliance with the checklist." FCC NY Order ¶ 51. BellSouth's "hierarchy of proof" approach is not conducive to either an exhaustive or a rigorous investigation.

Finally, the purpose of this docket is not to provide BellSouth with an outline to build its *prima facie* section 271 case. Rather, the purpose of this docket is to ascertain what evidence is

² Indeed, BellSouth's proposed issues do not even provide for the Authority to examine the reliability of BellSouth's performance data. Rather, the issues are limited to whether commercial usage exists in sufficient volumes. See BellSouth's Proposed Issue Nos. 1, 2, 3.

necessary to complete a balanced, thorough, and well-informed investigation of BellSouth's OSS. Such an investigation requires data from multiple sources for corroboration, depth, and scope. Where multiple sources of data provide consistent results, the Authority will have a higher level of confidence that the data is reliable, accurate, and complete. Where multiple sources of data provide inconsistent results, however, the Authority needs to resolve the factual dispute raised by the conflicting data before it can reach an informed conclusion. BellSouth's "hierarchy of proof" would not provide the Authority with that capability.

C. BellSouth's Proposed Revisions Improperly Assumes that Its Operational Support Systems Are Regional.

BellSouth claims at page two of its filing that it "has revised the previously approved issues . . . to conform to the evidence presented in Phase I of this proceeding." That simply is not true. BellSouth has revised the existing Phase II issues to assume, in large part, that its OSS are regional and its performance in other states is substantially the same as its performance in Tennessee. BellSouth's assumptions go to the core of the Phase I hearing. To assume that the Authority is going to rule in favor of BellSouth on the regionality issues smacks of arrogance and is an improper basis for any proposed revisions.

BellSouth's proposed Issue No. 2 is limited to determining whether "region-wide commercial usage exist in sufficient volumes," and effectively assumes that the data BellSouth has chosen to report on a regional basis (such as flow through data) accurately reflects BellSouth's performance in Tennessee. Likewise, BellSouth's Issue No. 5 is limited to the reliability of third party testing, and assumes the regionality of those tests. Again, the assumptions reflected in Issue Nos. 2 and 5 go to the core of the Phase I proceeding.

In addition, BellSouth's proposed Issue Nos. 4 and 6 now raise -- for the first time -- two other types of testing (carrier-to-carrier and internal testing) for the Authority's consideration in Phase II. Despite having the opportunity at the outset of this docket to request that the Authority include these two types of testing in the Phase I and Phase II issues, BellSouth did not do so. Consequently, there has been no opportunity in this docket for the CLECs to investigate through discovery the "regionality" and "reliability" of whatever carrier-to-carrier or internal testing that BellSouth may have conducted. Nor was there any opportunity to contest the regionality of any such tests in Phase I of this docket. Nevertheless, BellSouth effectively asks the Authority to ignore the "regionality" of carrier-to-carrier and internal testing, and limit its Phase II inquiry to the reliability of such testing³. Once again, BellSouth is attempting to circumvent due process to promote its corporate interests.

D. The Authority Should Not Determine Whether BellSouth Complies With State and Federal Law During Phase II of This Docket.

BellSouth states that it does not have a position as to whether BellSouth's compliance with Checklist Item ii should be heard in Phase II of this docket or in the Section 271 proceeding. BellSouth, however, contends that compliance with Checklist Item ii should only be heard in one docket, and the Authority should decide now which is the appropriate docket.

We do not believe that compliance with Checklist Item ii should be heard in Phase II of this docket because it is premature for two main reasons. First, the Authority has not yet determined whether third party testing is a necessary part of an exhaustive and rigorous review

³ BellSouth does not specify exactly what carrier-to-carrier or internal testing, if any, would be the subject of this issue. Nor does BellSouth explain its position on the CLEC's ability to conduct discovery on these unidentified tests.

of BellSouth's compliance with state and federal law. Evaluating compliance during Phase II rather than after Phase II effectively presupposes that third party testing is not necessary. Second, the CLECs have not conducted discovery in this docket regarding BellSouth's compliance with state and federal law.

After the completion of Phase II of this docket (including any third party testing ordered by the Authority), we believe that there are both advantages and disadvantages to determining compliance with Checklist Item ii under either docket. Utilizing a later phase in this docket provides the advantage of encompassing compliance with both state and federal law, whereas the 271 docket arguably is limited to federal law. A disadvantage to utilizing this docket, however, is that OSS impacts many checklist items, and Checklist Item ii is not limited to just OSS. Consequently, it could be difficult to make clear distinctions on whether an issue belongs in the OSS docket or the Section 271 docket. In any event, the Authority need not choose between dockets at this time. For the reasons stated above, we simply request that the Authority confirm that "nondiscriminatory access" is not a Phase II issue.

E. Phase II Should Include an Issue Regarding the Definition and Characteristics of Measurable Commercial Usage Data.

BellSouth states that it has no objection to the new issue proposed by the Authority regarding the definition and characteristics of measurable commercial usage data. In the same breath, however, BellSouth states that "the Authority need not define commercial usage." In addition, BellSouth states that the Authority must rely on BellSouth's existing Monthly State Summary or face a six to twelve month delay in the proceeding.

As we stated in our proposed revisions to the Phase II issues, we support the issue proposed by the Authority. We will, however, refrain from providing our view on the correct

answer to that issue until the Phase II hearing. Suffice it to say for now that we do not agree with BellSouth's comments.

II. IT IS PREMATURE TO DETERMINE WHAT NON-PARTY WITNESSES WILL NOT BE REQUIRED FOR PHASE II

At the Phase I hearing, the Authority made clear that it expected Mr. Lattimore of PricewaterhouseCoopers and Mr. Weeks of KPMG be available for the Phase II hearing if required. BellSouth now requests that the Authority not ask Mr. Lattimore to participate in Phase II. We believe that it is premature at this time to determine what "non-party" witnesses should participate in the Phase II hearing. It may very well be that Mr. Lattimore's participation would be irrelevant to Phase II, but to rule out Mr. Lattimore's participation before the submission of pre-filed testimony would be premature. Similarly, it may very well be that Mr. Weeks can provide all of necessary testimony regarding the third party tests in Georgia and Florida, but it also is possible (if not likely) that a different KPMG witness may be appropriate to provide testimony regarding the Florida test because of Mr. Weeks' apparent limited involvement in that test. Accordingly, we request that the Authority continue to keep all of the parties (BellSouth and CLECs) and non-parties (PWC and KPMG) on notice that the Authority may request the participation of non-party witnesses.

III. THE AUTHORITY SHOULD SYNCHRONIZE THE PHASE II PROCEDURAL SCHEDULE WITH THE PERFORMANCE MEASUREMENTS DOCKET.

BellSouth contends that the Authority need not wait for the completion and implementation of the performance measurements docket before proceeding with this docket and the section 271 docket because the Authority can adopt BellSouth's Monthly State Summary (MSS), which allegedly is based on the Georgia SQM. BellSouth also claims that if the Authority decides it should evaluate in this docket the data produced under the performance

measurements that are ultimately ordered by the Authority, then this docket will be delayed for six to twelve months.

We believe that Authority should synchronize the Phase II procedural schedule with the performance measurements docket. The Authority will decide on a particular set of performance measurements because it has concluded that those measures are important to promote competition and to gauge BellSouth's performance in supporting CLECs in Tennessee. The Authority, therefore, should be concerned with the reliability of the data produced under the Tennessee measures and how that data stacks up against the standards set by the Authority. If the Tennessee performance measurements and standards differ substantially from the Georgia SQM, data produced under the Georgia SQM would not be particularly probative as to BellSouth's performance in Tennessee or the reliability of the data produced under the Tennessee performance measurements. If the Tennessee performance measurements do not differ substantially, there should not be any significant delay. In either case, it is prudent for the Authority to synchronize the Phase II procedural schedule with the performance measurements docket.

IV. THE AUTHORITY SHOULD SYNCHRONIZE THE PHASE II PROCEDURAL SCHEDULE WITH THE PROGRESS OF THE FLORIDA THIRD PARTY TEST.

BellSouth states that "[t]here is no need for the Authority to wait until the conclusion of the Florida test to proceed with this docket" because BellSouth does not intend to rely on the Florida test. The issue here, however, is not whether BellSouth intends to rely on the Florida test in its section 271 application with the FCC. Rather, the issue is what evidence does the Authority need to conduct an exhaustive and rigorous review of BellSouth's compliance with state and federal law. For example, the Florida test may indicate that BellSouth does not provide

nondiscriminatory access. The Florida test also may indicate that the results of the Georgia test or BellSouth's performance data are not reliable. The mere fact that BellSouth does not rely the Florida test does not mean that the Authority should not consider those test results in this docket or its 271 docket. Indeed, the Authority should consider the Florida test to the extent that it is applicable and reliable.

The Authority should synchronize the Phase II procedural schedule with the progress of the Florida third party test. That does not necessarily mean that the Authority should suspend this docket until the completion of the Florida third party test. The Authority, however, should take certain factors into consideration when setting the Phase II procedural schedule. For example, the Authority should consider the outcome of Phase I in deciding whether it makes sense to wait for the conclusion of Florida test. The Authority also should take into consideration its desire to have the Florida test be part of Phase II. Obviously, the reliability of the Florida test cannot be properly reviewed through the contested case process until the test results have been published and discovery has conducted. In addition, the Authority should take into consideration procedural fairness and due process. For example, if the Authority grants BellSouth's request not to wait on the Florida test, then BellSouth should, as it says in its own words, "bear the burden of that decision." Specifically, the Authority should preclude BellSouth from relying on the Florida test to either limit the scope of any testing in Tennessee or support any claim in the future that its OSS complies with state and federal law.

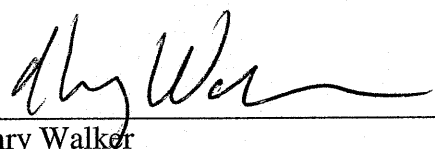
CONCLUSION

We respectfully request that the Authority reject BellSouth's proposed issues, and adopt the revisions proposed by the CLECs. As explained herein and in our previous filing, the

Authority has structured the Phase II issues to identify the information it needs to conduct an exhaustive and rigorous investigation of BellSouth's OSS as contemplated by state and federal law. BellSouth's proposed issues would not facilitate such an investigation. Rather, it would merely provide BellSouth with an opportunity to conduct a dress rehearsal for its 271 application and restrict the Authority's investigation. Accordingly, we respectfully request that the Authority adopt our recommendations (in whole or in part) or, in the alternative, maintain the existing Phase II Issues List. In addition, we request that the Authority adopt our recommendations regarding the miscellaneous procedural issues raised by BellSouth.

Respectfully submitted,

By: _____

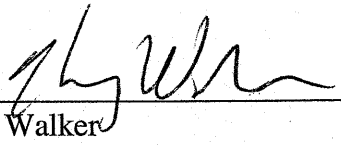

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 17 day of January, 2002.

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